

**PLANNING COMMISSION MINUTES OF NOVEMBER 28, 2005**

**2005-0664** – Appeal of a decision by the Administrative Hearing Officer to deny a Variance from Sunnyvale Municipal Code section 19.34.030 to allow for a 264 square-foot accessory utility building with a 2.5-foot side-yard setback where 4 feet is required and a 2-foot rear-yard setback where 10 feet is required. The property is located at **885 Lakechime Drive** (near Silverlake Dr) in an R-0 (Low-Density Residential) Zoning District. RK

**Ryan Kuchenig**, Assistant Planner, presented the staff report. This variance was reviewed and denied at the Administrative Hearing on August 10, 2005 and the decision was appealed. Mr. Kuchenig submitted photos provided by the applicant showing pictures of similar structures within the neighborhood. Since the August 10th hearing, the applicant has submitted many letters and signatures in support of this appeal. Staff was only able to make one of the three required findings and recommends denial of the appeal.

**Comm. Sulser** said on his site visit the applicant said that the current shed was built on the foundation of a previous, legal non-conforming shed. Comm. Sulser asked if there is a rule that allows this. Mr. Kuchenig said it is staff's understanding that a previous shed was torn down with only the concrete foundation remaining. **Trudi Ryan**, Planning Officer, said the City has no record of any previous shed permitted at this location.

**Comm. Moylan** said that staff had previously responded to a question regarding the foundation and clarified that if there had been the same foundation for a legal structure, then it could be rebuilt. Comm. Moylan said based on his site visit, this shed has clearly been rebuilt on an existing foundation and the key issue is whether the previous structure was legal. Ms. Ryan said a legal structure would require a building permit and there is no evidence that a building permit has ever been issued for this property. Ms. Ryan added that the building code requiring a permit for a shed this size would have been in place for this residential area prior to the time these homes were built and it is unlikely that the previous shed would have been allowed.

**Comm. Simons** said that there are a lot of unpermitted accessory buildings in the City and commented that the questioning of this shed seems arbitrary. Ms. Ryan said the City does not have a proactive program looking for unpermitted structures, but if a structure is brought to staff's attention, then it is addressed.

**Chair Hungerford** opened the public hearing.

**Richard Becker, Jr.**, the applicants' son, spoke on behalf of his parents. He provided a history of the previous shed and two other structures, now removed, that were also on the concrete foundation. He said the previous structures were

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present for many years with no incidents and that over the years PG & E and City inspectors have been on the property for various reasons and never commented about the structures. He said several years ago his father was diagnosed with a health condition and the family decided to improve his quality of life by removing the aging buildings, consolidating and to building the new workshop. He said a lot of thought was put into the building and they were in process of building a small storage shed when it was brought to the City's attention that there was building taking place. They were contacted by Neighborhood Preservation staff and informed that they should stop building and that there might be a problem with the workshop. He said they are trying to work through the process. Mr. Becker showed a map of the area indicating neighbors who have signed a "petition" of support to retain the structure.

**Comm. Babock** asked Mr. Becker why a shed this size was built without permits. Mr. Becker said they were improving the property and building something smaller than what was previously there. He said they built a safe building and that the electrical was previously permitted to run for a hot tub.

**Comm. Sulser** asked Mr. Becker if he had any comments regarding the findings in Attachment A, as the Commission has to be able to make all three findings to approve the variance. Mr. Becker said there are many non-conforming structures in the Lakewood Village area and to not allow his parents to keep the workshop would deprive his parents of something that many others in the neighborhood are allowed to enjoy. Mr. Becker said he has looked through City records and was only able to find one shed in the nearby area that was legally permitted.

**Comm. Moylan** said on his site visit it appeared that the applicant's were under the impression that the previous structures were legal non-conforming structures. He asked if Mr. Becker's family put the previous structures on the property. Mr. Becker said yes, and to his knowledge his family did not obtain permits for the structures. Comm. Moylan said that the structures therefore, were unpermitted rather than legal non-conforming, which is a key issue for him.

**Berenice Becker**, applicant, said she is very proud of the home they have lived in for so many years. She said that the structures had been on the property for so many years that they were under the impression that there was a grandfather clause allowing them. She thanked the Commissioners that were able to visit their home for coming to the site.

**Comm. Moylan** asked who had told them there was a grandfather clause. She said she would prefer not to say, but that it was an official.

**Day Le**, a resident of Sunnyvale and neighbor of the applicant, spoke in support of the appeal. He said the house looks very good and he would like them to be able to keep the workshop.

**Harriet Rowe**, resident of Sunnyvale, commented that Lakewood Village does have a large number of accessory buildings, but has been working on cutting back on the non-conforming structures in the area. She said she questions the size of the workshop which is large for the size of the property. She commented that if there is "grandfathering" that it does not have to be forever, and that maybe allowing the shed for a certain amount of time could be considered. She said just because rights have been waived in bad judgment in the past does not mean that the Commission has to continue to waive rights to make the best judgment.

**Comm. Simons** said to Ms. Rowe that she brought up the importance of being consistent to make the neighborhood conforming and also allowing time before the structure would be brought into conformance. He said these two issues are a bit incompatible. Ms. Rowe said the Commission has the decision to make, but if extending the time is against what the code will allow then it cannot be offered. Comm. Simons asked staff if the City has ever given an extended time to bring a structure into conformance. Ms. Ryan said that staff has worked with property owners on achieving compliance, but with variances it is either approved or not. She said staff has worked on schedules with property owners to bring items into compliance, but not for more than a few months.

**Comm. Moylan** said he recalled in February 2004 that a shed in the Lakewood Village area was built without a permit and resulted in a shed that was taller than permitted. They applied for the permit after the fact and were given a year to either remove the shed or comply with the height requirement. Ms. Ryan added that there was no variance involved in that instance. Ms. Rowe commented that the applicant would need to work with the Planning Division on a solution.

**Mr. Becker** asked if the Commission had any further questions of him. They did not.

**Chair Hungerford** closed the public hearing.

**Chair Hungerford** commented that it is hard to approve this variance. He expressed his concerns about enforcing the City regulations and how they can appear to have a harsh result. He said the Commission is bound by making the findings and commented how the findings apply to this situation. He said he was struggling with the third finding in this case.

**Comm. Moylan** said it is clear that the Commission is supposed to decide the land use independent of who actually lives at the property. He said he advised the applicant of this at the time of his site visit. He felt compelled to comment about another decision that the Planning Commission had made in February 2004 when a variance was granted for a house and the Commission was swayed even though it was hard to make all the findings. He said with this appeal the

applicant has made a structure less bad than it was, but it is still not permitted, and it is hard to make the findings.

**Comm. Babcock** said that she feels a variance is something that the Commission needs to be able to make all the findings on in order to approve it. She said that it is a bit frightening that the building was built without permits or inspections and has electricity. She said that the Commission should really uphold the regulations on the land use.

**Comm. Simons** said that on his site visit he found this to be one of the nicest sheds he had ever seen. He said he may not be able to make the findings and give a variance, but he may ask that there be an extended transition time for this shed.

**Comm. Babcock** made a motion for Alternative 1, to deny the appeal and Uphold the Administrative Hearing officer's decision to deny the Variance. Comm. Moylan asked if she wanted to specify a timeframe bring the structure into compliance. Comm. Babcock said that the applicant could have up to one year to comply. Comm. Moylan seconded the motion. Ms. Ryan expressed her concern about placing a specified timeframe in the motion without consulting the building staff due to possible safety issues. Ms. Ryan advised the Planning Commission and the applicant that they may not have a year if there are safety issues. Comm. Babcock and Comm. Moylan accepted staff's concern and incorporated it into the motion.

**Comm. Babcock** said she was unable to make the findings. She said she realizes there are a lot of unpermitted structures in the Lakewood Village, but just because the neighbors have illegal structures does not mean it should be allowed. She said the neighborhood should be concerned that structures are being used without permits and inspections and she would like to see all of Lakewood Village following the rules.

**Comm. Simons** agrees with the motion, but disagrees with the implementation. He would like to see a way to deal with the possible safety issue, but still allow some time to bring the structure into compliance.

**Chair Hungerford** clarified that the motion includes allowing up to a year to take the building down unless there are safety issues. Ms. Ryan said we have an obligation to complete the process and she does not know if the building code would allow waiting a year.

**Comm. Babcock** clarified that when she said the applicant could have up to one year to comply that she was referring to complying with the options in the report that would allow them to apply for the correct permits and to get inspections.

**Comm. Moylan** said that taking the shed down was not part of the motion. This motion denies this variance.

**Comm. Simons** confirmed that staff's safety concerns are that changes might have to be addressed sooner than one year. Comm. Babcock agreed that safety supersedes everything else. Ms. Ryan said that staff understands the Commissioners' concern about allowing a year to comply, but may not be able to accommodate it. She said staff would be happy to work with the applicant and give them the maximum amount of time that is safe. She said staff wants to protect the City, the property owner and the neighbors.

**Rebecca Moon**, Assistant City Attorney, discouraged placing a time limit in the motion as the staff that needs to address the safety issues are not present to comment. She reminded the Commission of a fire in Los Gatos recently that resulted from an unpermitted structure.

**Vice Chair Fussell** commented that it does not make sense to have inspections done for safety just to allow a building to remain a little longer before removing it. He said it could set an expectation by the applicants that they might be able to keep the shed. He said though he would like to extend the removal of the shed, he believes it could put the City in a precarious position.

**Comm. Babcock** asked how the applicant could explore the other alternatives mentioned in the report without being given some type of time span. Ms. Moon said the Commission could make a motion denying the variance and Neighborhood Preservation would work with the applicant to bring the property into compliance in a reasonable time frame.

**Comm. Babcock** restated her motion and **moved for Alternative 1, to deny the Appeal and Uphold the Administrative Hearing Officer's decision to deny the Variance. Comm. Moylan seconded.**

**Final Action:**

**Comm. Babcock made a motion on 2005-0664 to deny the Appeal and Uphold the Administrative Hearing Officer's decision to deny the Variance. Comm. Moylan seconded.**

**Motion carried unanimously, 7-0.**

**This item is appealable to the City Council no later than December 13, 2005.**